

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE VAN ORSDER

TRANSCRIPT OF RECORD.

COURT OF APPEALS, DISTRICT OF COLUMBIA,
October
~~JANUARY~~ TERM, 1924.

No. 4094.
⁸
No. ~~25~~ SPECIAL CALENDAR.

72

UNITED STATES, APPELLANT,
vs.

ARTHUR A. O'BRIEN AND DAVID J. MALONEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 11, 1924.

No. 4094.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1924.

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No. 25 Special Calendar.

UNITED STATES, APPELLANT,

vs.

ARTHUR A. O'BRIEN AND DAVID J. MALONEY, AP-
PELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Supreme Court of the District of Columbia.

UNITED STATES, PLAINTIFF,

vs.

ARTHUR A. O'BRIEN AND DAVID J. MALONEY,
defendants.

Criminal, No. 40696.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Indictment.

Filed in Open Court Mar. 26, 1923. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia, holding a criminal term. Of the January term, in the year 1923.

DISTRICT OF COLUMBIA, SS:

The grand jurors for the United States of America empaneled and sworn in the Supreme Court of the District of Columbia, holding a criminal term at the January term of said court in the year 1923, and inquiring for said District of Columbia, upon their oath present, that Arthur A. O'Brien, throughout the period of time from March 1, 1920, to May 1, 1920, in the city of Washington and said District of Columbia, was an employee of the United States in the service of the War Department thereof, and a person acting for and on behalf of the United States in an official capacity, that is to say, a Lieutenant Colonel in the Army of the United States, detailed for duty in the office of the Secretary of War; that as such employee and person, it became and was the duty of said Arthur A. O'Brien, among other

things, to supervise for said Secretary of War, the adjustment

2 and payment of claims against the United States and said War

Department arising under the Act of Congress approved March 2, 1919, and entitled "An Act To provide relief in cases of contracts connected with the prosecution of the war, and for other purposes;" that said Arthur A. O'Brien, in the performance of his said duty, was intrusted by the Secretary of War with great discretion and power; that said Secretary then had great confidence in said Arthur A. O'Brien and in his correctly performing his said duty, and placed great reliance upon his advice and recommendations in connection therewith; and that David J. Maloney, throughout said period of time, was an attorney, and in that capacity acted for the Newbury Realty Company hereinafter mentioned in prosecuting the claim of said company hereinafter described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Arthur A. O'Brien and David J. Maloney,

hereinafter referred to as defendants, throughout said period of time, at said city of Washington, in said District of Columbia, each then well knowing all the matters and things in this indictment alleged, under the circumstances and conditions herein set forth, unlawfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to defraud the United States of a large sum of money, to wit, of the sum of \$28,210.24, in the manner and by the means following; that is to say:

3 Said defendants, according to said unlawful and felonious conspiracy, combination, confederation, and agreement, were to and in fact did defraud the United States of said sum of money by applying, and procuring the application of, that sum of money of the moneys of the United States in the Treasury theretofore appropriated for the payment of lawful claims arising, during the fiscal year ended June 30, 1920, under said act of Congress, to the payment and adjustment of a certain claim of said The Newbury Realty Company, a corporation under the laws of the State of Massachusetts, growing out of the leasing, during the period from December 1, 1918, to June 30, 1919, of the Newbury Building, situated in the city of Boston, in said State of Massachusetts, by the War Department of the United States, for the use of the United States Quartermaster's Corps, it being a claim for the reimbursement of said Newbury Realty Company on account of moneys expended by it in making certain changes and improvements upon said building, when, as said defendants then and there well knew, said claim, by reason of the fact that it was not a claim based upon or arising out of any agreement, express or implied, entered into by any officer or agent acting under the authority, direction or instruction of the President of the United States or of said Secretary of War, was not payable out of said appropriation, and, by reason of the fact that it was not then a valid claim against the United States

5 under any provision of law, was not a claim which could lawfully be paid out of any moneys of the United States under the control of said War Department or in said Treasury.

And, according to said unlawful and felonious conspiracy, combination, confederation and agreement also, and notwithstanding the premises aforesaid, said David J. Maloney was to induce said Arthur A. O'Brien to use, and aid said Arthur A. O'Brien in using, and said Arthur A. O'Brien was to use, his authority as such employee and person to place upon the records of said War Department in connection with said claim such matters in writing as would indicate that said claim was in fact a claim based upon and arising out of an implied agreement entered into by the Government obligating it to reimburse said Newbury Realty Company for such changes and improvements, and as would indicate that because of such agreement, and because of its having been entered into prior to November 12, 1918, said claim constituted a valid obligation of said War Department under the provisions of said act of Congress, and

was a claim lawfully arising under said act of Congress, and one which could lawfully be paid out of said appropriation, and thereupon and thereby said defendants were deceitfully to secure the approval and order of said Secretary of War for the adjustment and payment of said claim out of said appropriation, and so defraud the United States of the amount thereof, as aforesaid.

5

OVERT ACTS.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, to effect the object of the unlawful and felonious conspiracy, combination, confederation and agreement aforesaid, said defendants, at the several times and at the place in that behalf hereinafter mentioned in connection with their names, did do, among many others, certain acts; that is to say:

1. Said Arthur A. O'Brien and David J. Maloney, on March 11, 1920, at Washington aforesaid, in said District of Columbia, met and conferred together concerning the procurement of payment of said claim of said Newberry Realty Company out of said appropriation.

2. Said Arthur A. O'Brien and David J. Maloney, on March 29, 1920, at Washington aforesaid, in said District of Columbia, prepared and caused to be typewritten a certain document and memorandum of the tenor following, to wit:

WAR DEPARTMENT,
Washington, March 29, 1920.

Memorandum for the War Department Board of Appraisers:

Subject: Claim of Newbury Realty Company, Boston, Mass. 84 L-C.

This matter came up for hearing before the Secretary of War on an oral appeal of the claimant, represented by its attorneys.

6 It appears from the record of the hearing that on October 2, 1918, claimant submitted for acceptance to the War Department its building, then about 75 per cent completed, to contain 90,000 square feet floor space, at a rental of \$80,000 per annum. This proposal was accepted on behalf of the War Department with the condition that the building be completed, making provision for two elevators in place of one, as planned, and doubling the toilet facilities; possession to be delivered not later than December 1, 1918, with a provision for a penalty equivalent to rental charges paid by the Government for the Ford Building in Cambridge. It was agreed that the lease to be executed would be on the regular War Department form and would contain an option allowing the Government to retain possession under the terms until June of 1924.

Subsequent to the proposal and acceptance, on October 10, 1918, the lessor was directed to make other changes in the building, involving additions to the heating system, changes in electrical work, making provision for a laboratory, rest room, and dispensary, providing for additional fireproof doors. During the course of the work the lessor was required by local regulations to erect a brick fire wall separating the portion of the building which was to be used

as a garage by the Government, and was required by local authorities to reinforce the elevator machinery and support. In the latter item an appeal from the order of the local authorities was directed by the Government agents not to be pursued, and the changes were, therefore, made in the building. The total cost of all changes in the building as originally planned aggregated \$43,896.24, divisible into the following classifications:

Items provided for in the lease.....	\$15,686.00
Items not provided for in the lease.....	28,210.24

On June 30, 1919, possession of the property was surrendered by the Government, after having paid \$41,397.82 total rent for six months and twelve days, and the Government having deducted \$1,182.78 as a penalty under the lease for failure to have the building ready for occupancy on December 1, 1918. It has been represented that in order to restore the building to the original plans of the lessor to provide the floor space originally designed the cost will be \$16,240.

From the record it is apparent that the claimant was induced to expend the \$43,896.24 for changes in the building under its belief that the Government would continue to occupy the premises until June of 1924, but no claim for rents after June 30, 1919, can be recovered. Neither can recovery be had for items of cost of changes provided for in the lease aggregating \$15,686.00; nor can the claimant be relieved from the penalty imposed under the terms of the lease for failure to have the building ready by December 1, 1918. The equities of the claim based upon changes not provided for in the lease are, in the opinion of the Secretary of War, with the claimant.

It is, therefore, the decision of the Secretary of War that the changes not provided for in the lease were made by the lessor under a subsequent implied agreement on the part of the Government that it would reimburse the lessor for such changes. The War Department Board of Appraisers is, therefore, directed to amend its award by making provision for the payment to the claimant of the sum of \$28,210.24 the cost of changes in the building not provided for in the lease.

NEWTON D. BAKER,
Secretary of War.

3. Said Arthur A. O'Brien, on March 29, 1920, at Washington aforesaid, in said District of Columbia, placed his initials, to wit, A. O'B., upon said document and memorandum, near the typewritten name "Newton D. Baker."

4. Said Arthur A. O'Brien and David J. Maloney, on April 10, 1920, at Washington aforesaid, in said District of Columbia, met and conferred together concerning the procurement of payment of said claim of said Newbury Realty Company out of said appropriation.

5. Said Arthur A. O'Brien and David J. Maloney, on April 14, 1920, at Washington aforesaid, in said District of Columbia, prepared and caused to be typewritten a certain other document and memorandum of the tenor following, to wit:

9

WAR DEPARTMENT,
Washington, April 14, 1920.

Memorandum for the War Department Board of Appraisers:

Subject: Claim of the Newbury Realty Company, Boston, Mass.,
No. 84 L-C.

The finding of the Secretary of War, under date of March 29, 1920, is hereby amended so that the last paragraph shall read as follows:

"It is therefore the decision of the Secretary of War that the changes not provided for in the lease were made by the lessor under a subsequent implied agreement on the part of the Government that it would reimburse the lessor for such changes. That such subsequent implied agreement was made between the dates of October 10, 1918, and November 11, 1918, and constitute a valid obligation of the War Department under the provisions of the 'Dent Act.' The War Department Board of Appraisers is, therefore, directed to amend its award by making provision for the payment to the claimant of the sum of \$28,210.24 in full discharge of such obligation of the War Department under the provisions of the 'Dent Act.'"

NEWTON D. BAKER,
Secretary of War.

10 6. Said Arthur A. O'Brien, on April 14, 1920, at Washington aforesaid, in said District of Columbia, placed his initials, to wit, A. O'B., upon said last-mentioned document and memorandum, near the typewritten name "Newton D. Baker."

7. Said David J. Maloney, on April 20, 1920, at Washington aforesaid, in said District of Columbia, accepted and received from said War Department a certain check and voucher, to wit, check No. 331583 and voucher No. 3175, covering the payment of the sum of \$28,210.24 to said Newbury Realty Company.

CONCLUSION.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Arthur A. O'Brien and David J. Maloney, during the period of time, at the place and in manner and form aforesaid, unlawfully and feloniously did conspire to defraud the United States, and each of them did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

PEYTON GORDON,
United States Attorney.

C. FRANK REAVIS,
F. DONALD ENFIELD,
OLIVER E. PAGAN,

Special Assistants to the Attorney General.

5. The indictment does not allege any fact showing that the claim therein referred to was not payable out of the appropriation therein mentioned, but simply alleges that it was not so payable because it was not "a valid claim against the United States under any provision of law," which is a conclusion of law, not a statement of facts.

6. The indictment does not allege any fact or facts sufficient to charge the commission of any offense against the laws of the United States.

7. It is necessary to validity that the indictment must set
14 out facts showing a violation of law and not mere statements or conclusions of law, and the indictment in this case fails to comply with this rule of pleading.

8. The indictment is pivoted upon an alleged erroneous conclusion of law and not upon any exposed facts.

9. The indictment is so vague, indefinite, and uncertain that it does not fairly or sufficiently inform the defendant of the charge which he is expected to meet at the trial.

10. The accusatory part of the indictment is so vague, indefinite, and uncertain that a judgment on a trial would not protect the defendant against a subsequent prosecution.

11. It is shown on the face of the indictment that this defendant honorably and properly performed his official duties while an officer of the United States Army.

12. The indictment is bad for other reasons apparent of record.

FRANK J. HOGAN,
Attorney for Defendant Arthur A. O'Brien.

To Honorable PEYTON GORDON,
United States Attorney for the District of Columbia,
Honorable C. FRANK REAVIS,
Honorable F. DONALD ENFIELD, and
Honorable OLIVER E. PAGAN,
Special Assistants to the Attorney General of the United States:

Take notice that the foregoing demurrer to the indictment in criminal case No. 40696 will be filed the 30th day of April, 1923, by leave of court duly had and obtained, and that the same will
be presented to the justice presiding in Criminal Court No. 2
15 Friday, May 4, 1923, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

FRANK J. HOGAN,
Attorney for Defendant Arthur A. O'Brien.

Service of copy of the foregoing demurrer acknowledged this 30th day of April, 1923.

PEYTON GORDON,
W

United States Attorney, D. C.

C. F. REAVIS,
F. DONALD ENFIELD,
OLIVER PAGAN,

By F. D. E.,
Special Assistants to the Attorney General.

Fiat of Justice Bailey.

APRIL 30, 1923.

Let this demurrer be filed.

JENNINGS BAILEY, *Justice.*

Demurrer of the Defendant David J. Maloney.

Filed May 1, 1923.

* * * * *

Comes here again the defendant, David J. Maloney, and by leave of the court first duly had and obtained withdraws his plea to the indictment in this cause filed and in lieu thereof demurs to the said indictment and says that the indictment is bad in substance.

16 NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. The indictment shows that the claim of the Newbury Realty Company for reimbursement on account of moneys expended by it in making directed changes and improvements upon the leased building therein mentioned was a valid and subsisting claim against the United States and founded upon an implied contract, and within the provisions of the act of Congress known as the Dent Act, approved March 2nd, 1919.

2. The indictment shows that the claim of the Newbury Realty Company for reimbursement on account of moneys expended by it in making the directed changes and improvements upon the Realty Building leased to the United States was a valid and subsisting claim against the United States.

3. The indictment does not allege any facts or particulars showing any conspiracy to defraud the United States in any manner or for any purpose.

4. The indictment does not allege any facts showing that the claim of the Newbury Realty Company was not a claim based upon or arising out of an agreement, express or implied, entered into by a duly authorized officer of the United States, but simply alleges the legal conclusion that the claim was not one based upon or arising out of any agreement, express or implied, entered into by any authorized officer.

17 5. The indictment does not allege any fact showing that the claim therein referred to was not payable out of the appropriation therein mentioned, but simply alleges that it was not

so payable because it was not "a valid claim against the United States under any provision of law," which is a conclusion of law, not a statement of facts.

6. The indictment does not allege any fact or facts sufficient to charge the commission of any offense against the laws of the United States.

7. It is necessary to validity that the indictment must set out facts showing a violation of law and not mere statements or conclusions of law, and the indictment in this case fails to comply with this rule of pleading.

8. The indictment is pivoted upon an alleged erroneous conclusion of law and not upon any exposed facts.

9. Assuming the truth of every statement of fact in the indictment, and eliminating the conclusions of law, no offense against the United States is charged.

10. The accusatory part of the indictment is so vague, indefinite, and uncertain that a judgment on a trial would not protect the defendant against a subsequent prosecution.

11. Nothing is shown on the face of the indictment but that this defendant properly and honorably, consistent with the ethics of his profession as a lawyer, presented his claim in behalf of his client, the Newbury Realty Company, and was successful in having it allowed.

12. The indictment is bad for other reasons apparent of record.

ROGER J. WHITEFORD,

Attorney for Defendant David J. Maloney.

18 To Honorable PEYTON GORDON,

United States Attorney for the District of Columbia.

Honorable C. FRANK REAVIS.

Honorable F. DONALD ENFIELD.

Honorable OLIVER E. PAGAN.

Please take notice that the foregoing demurrer to the indictment in criminal case No. 40,696 will be filed the 1st day of May, 1923, by leave of court duly had and obtained, and the same will be presented to the judge presiding in Criminal Court No. 2 on Friday, May 4th, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

ROGER J. WHITEFORD,

Attorney for Defendant, David J. Maloney.

Service of copy of the foregoing demurrer and notice acknowledged this 1st day of May, 1923.

PEYTON GORDON,

United States Attorney.

by MURRAY.

Fiat of Justice Bailey.

Let this demurrer be filed.

JENNINGS BAILEY, *Justice.*

Memorandum opinion.

Filed July 13, 1923.

* * * * *

I think that the indictment is insufficient in two respects:

1. It does not clearly aver that the defendants knew that the claim of the Newberry Realty Co. was not a claim based upon or arising out of any agreement, express or implied, entered into by any officer or agent acting under the authority, etc., of the President of the United States or the Secretary of War. It is true that the indictment does aver that the defendants well knew that claim was not a valid claim under the act of March 2, 1919, but it does not appear whether the reason given for its invalidity is the averment of the pleader or was a fact known to the defendants.

2. The indictment does not sufficiently set out the facts upon which the claim of the Newberry Realty Co. was based for the court to determine whether it was a claim based upon an implied agreement entered into under the authority, etc., of the President or Secretary of War. If the statute had provided for claims based only upon an express contract, the indictment might perhaps have been sufficient, but as it also includes claims based upon an implied contract I think that it should set out the facts from which the court can determine whether or not there was an implied contract.

For these reasons the demurrer will be sustained.

JENNINGS BAILEY, *Justice*.

Supreme Court of the District of Columbia.

THURSDAY, JULY 19TH, A. D. 1923.

As of July 13th.

The court resumes its session pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * *

Now comes the defendant Arthur A. O'Brien by his attorney, Frank J. Hogan, Esquire, and the defendant David J. Maloney by his attorney, Roger J. Whiteford, Esquire; and thereupon the defendants' respective demurrers coming on to be heard are by the court sustained; whereupon it is considered by the court that the said defendants go thereof without day.

Note of Appeal.

Filed August 3, 1923.

* * * * *

Now comes the United States, by Peyton Gordon, attorney of the United States in and for the District of Columbia, and notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the court entered in the above-entitled cause on the thirteenth day of July, 1923, sustaining the demurrers filed by the defendants Arthur A. O'Brien and David J. Maloney and dismissing the indictment.

PEYTON GORDON,
United States Attorney.

21 In the Supreme Court of the District of Columbia.

UNITED STATES VS. ARTHUR A. O'BRIEN and DAVID J. MALONEY.	}	At law. No. 40696 Criminal. In Equity.
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The President of the United States to Arthur A. O'Brien and David J. Maloney; greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the Supreme Court of the District of Columbia, on the third day of August, 1923, wherein the United States is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter I. McCoy, chief justice of the Supreme Court of the District of Columbia, this third day of August, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.]

MORGAN H. BEACH,
Clerk.

ALF G. BUHRMAN,
Asst. Clerk.

Service of the above citation accepted this day of , 19 .

ROGER J. WHITEFORD,
Atty. for David J. Maloney.
 Aug. 6, 1923.

FRANK J. HOGAN,
Atty. for Arthur A. O'Brien.
 Aug. 2, 1923.

(Indorsed:) No. 40696 Crim. United States vs. Arthur A. O'Brien et al. Citation. Issued Aug. 3, 1923. Served copy of the within citation on Frank J. Hogan, Sefton Darr. E. C. Snyder, marshal. W. H. Peyton Gordon, attorney for appellant.

22 Assignments of error.

Filed September 17, 1923.

* * * * *

The United States of America assigns as error the following:

1. The court erred in sustaining the demurrer to the indictment.
2. The court erred in not overruling the demurrer to the indictment.
3. The court erred in holding that it does not appear from the indictment whether the reason given for the invalidity of the claim

of the Newbury Realty Company is an averment of the pleader or was a fact known to the defendants.

4. The court erred in holding that the indictment does not sufficiently set out the facts upon which the claim of the Newbury Realty Company was based for the court to determine whether it was a claim based upon an implied agreement entered into under the authority and direction of the President or Secretary of War.

5. The court erred in holding, in effect, that the indictment should charge the object sought to be accomplished by the alleged conspiracy with the same particularity with which the substantive offense is charged.

PEYTON GORDON,
*Attorney of the United States in and for
the District of Columbia.*

C. FRANK REAVIS,
Special Assistant to the Attorney General.

Designation of record.

Filed September 17, 1923.

* * * * *

In preparing the transcript of record on appeal to the Court of Appeals the clerk will please include the following:

1. Indictment.
2. Note of recognizance, March 29, 1923.
3. Note of recognizance, April 14, 1923.
4. Demurrer of defendant O'Brien.
5. Demurrer of defendant Maloney.
6. Opinion of Mr. Justice Bailey.
7. Order sustaining demurrers and discharging defendants.
8. Note of appeal.
9. Citation on appeal.
10. Assignments of error.
11. This designation.

PEYTON GORDON,
*Attorney of the United States in and for
the District of Columbia.*

Service acknowledged this 12th Sept., 1923.

ROGER J. WHITEFORD.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 40696, Criminal Docket, wherein United States is plaintiff and Arthur A. O'Brien and David J. Maloney are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said district, this 11th day of January, 1924.

[SEAL.]

MORGAN H. BEACH, *Clerk.*

By W. E. WILLIAMS, *Assistant Clerk.*

EW

(Indorsed on cover: District of Columbia Supreme Court. No. 4094. United States, appellant, *vs.* Arthur A. O'Brien and David J. Maloney. Court of Appeals, District of Columbia. Filed Jan. 11, 1924. Henry W. Hodges, clerk.

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